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BRIEFS

NO. 15-1358

IN THE

Supreme Court of the United States

JAMES W. ZIGLAR, PETITIONER,

v.

AHMER IQBAL ABBASI, *ET AL.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER JAMES W. ZIGLAR

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WILSON-EPES PRINTING CO INC. – (202) 789-0096 – WASHINGTON, D C 20002

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I. PETITIONER JAMES W. ZIGLAR ADOPTS THE ARGUMENTS IN THE REPLY BRIEFS OF PETITIONERS IN NO. 15-1359 AND NO. 15-1363 WITH REGARD TO THE EXTENSION OF A *BIVENS* REMEDY TO THE CLAIMS AGAINST MR. ZIGLAR, AND WITH REGARD TO WHETHER MR. ZIGLAR IS ENTITLED TO QUALIFIED IMMUNITY.

Mr. Ziglar adopts by reference and incorporates herein the arguments set forth in the Reply Brief For Petitioners Ashcroft and Mueller in No. 15-1359, and the arguments set forth in the Reply Brief For Petitioners Hasty and Sherman in No. 15-1363, the cases that the Court has consolidated with this case, both on the issue whether to extend a remedy under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against Mr. Ziglar under the circumstances of this case, and on the issue whether the DOJ Defendants, including Mr. Ziglar, are entitled to qualified immunity.

On either of these grounds, the Court should reverse the judgment of the court of appeals as to Mr. Ziglar.

II. THE ALLEGATIONS OF THE FOURTH AMENDED COMPLAINT FAIL TO STATE A PLAUSIBLE CLAIM FOR RELIEF AGAINST MR. ZIGLAR UNDER *IQBAL*.

Mr. Ziglar adopts by reference and incorporates herein the arguments set forth in the Reply Brief For Petitioners Ashcroft and Mueller in No. 15-1359, and the arguments set forth in the Reply Brief For Petitioners

Hasty and Sherman in No. 15-1363, regarding why the respondents' Fourth Amended Complaint fails to meet the pleading requirements of this Court's decision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). He respectfully adds the following additional argument on this issue.

Respondents and several *amici* focus on the language in *Iqbal* where this Court stated that "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678. *See* Reprinted Brief For Respondents ("Brief For Resps."), at 47; *e.g.*, Brief Of Professors Of Civil Procedure As *Amici Curiae* In Support Of Respondents, at 6. Stated in terms particular to Mr. Ziglar, the issue under *Iqbal* is whether the Fourth Amended Complaint pleaded sufficient factual content to permit the court to draw a reasonable inference that ***Mr. Ziglar*** engaged in purposeful discrimination in violation of the Fifth Amendment's Equal Protection Clause, or violated respondents' substantive due process rights under the Fifth Amendment to be free from arbitrary and purposeless punishment.

At all stages of this lengthy litigation, respondents have tried to conflate their allegations against petitioners Ashcroft and Mueller with those against Mr. Ziglar, to allege claims against Mr. Ziglar by association, as it were. For example, after alleging that it was Mr. Ashcroft who ordered that the detainees on the FBI's New York List be held as persons "of interest" until cleared, the very next paragraph of their Fourth Amended Complaint alleged that this was "Ziglar's decision," based on his

"discriminatory notion[s]" about Muslims and Arabs. No. 15-1359, App. Petn. Cert., at 268a, ¶ 48.[1] In their merits brief in this Court, respondents similarly lump Mr. Ziglar in with Mr. Ashcroft and Mr. Mueller, referring to "Petitioners' decision to merge the lists," to the "dicriminatory inteny" of "DOJ Petitioners," and to "Petitioners' hold-until-cleared policy," without distinguishing among the three officials. Brief For Resps., at 64, 65 & 51.

In evaluating the plausibility of respondents' claims against Mr. Ziglar, however, the focus should be on the specific allegations as to him, to determine if those allegations are conclusory, and if not, whether they nevertheless fail to plead sufficient factual content to permit the court to draw the reasonable inference that Mr. Ziglar is liable for the equal protection and due process violations respondents seek to plead. The sparse allegations of respondents' Fourth Amended Complaint, conclusory or devoid of factual content, fail to pass this test as to Mr. Ziglar.

Before addressing those allegations, it bears emphasis that Mr. Ziglar during the times relevant to the Fourth Amended Complaint served as the Commissioner of the Immigration And Naturalization Service. He was

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[1] All subsequent references to the App. Petn. Cert. are to the Appendix filed in No. 15-1359 by petitioners Ashcroft and Mueller along with their certiorari petition.

not the Attorney General, with broad command of the federal government's law enforcement agencies. To the contrary, he was subordinate to the Attorney General. Mr. Ziglar had no authority over the Bureau of Prisons, and the Bureau of Prisons had no authority over Mr. Ziglar. Mr. Ziglar had no authority over the Director of the FBI or over agents of the FBI, and the Director of the FBI had no authority over Mr. Ziglar. *E.g.*, 2001 8 USCS § 1103, Power And Duties Of The Attorney General And Commissioner (reprinted in the Appendix to this brief).

Respondents' allegations against Mr. Ziglar must be read against this statutory statement of his duties and authority as INS Commissioner, both what he had responsibility for and what he did not. As INS Commissioner, Mr. Ziglar had no authority to order the FBI to detain those persons on the FBI's New York List. He had no authority to order that the persons on the FBI's New York List be designated as "of interest." He had no authority to determine the conditions under which the Bureau of Prisons held any persons (including those designated as "of interest" in the 9/11 investigation), at the New York Metropolitan Detention Center (or in any other Bureau of Prisons facility), in the aftermath of the 9/11 attacks (or at any other time). It is against this background of the scope of Mr. Ziglar's authority as INS Commissioner that the Fourth Amended Complaint's allegations as to him must be evaluated under *Iqbal*.

Respondents' brief on the merits in this Court catalogues their meager allegations about Mr. Ziglar. They note that the Fourth Amended Complaint alleged that Mr. Ziglar "condoned" or "complied with" Mr.

Ashcroft's decision to designate the persons on the FBI's New York List as "of interest," even though he knew that the FBI had no reason to suspect those persons of having ties to terrorism. Brief For Resps., at 51-52, 59-60 & 65. They refer to the averments of the Fourth Amended Complaint that supposedly contain "details" regarding "daily reports" Mr. Ziglar allegedly made to Mr. Ashcroft "on persons arrested and other developments of interest." *id.*, at 61, reports they characterize as "detailed." *Id.* at 4-5 & 61. And they allege that Mr. Ashcroft instructed Mr. Mueller to tell the Immigration And Naturalization Service to "round up every immigration violator fitting [the] profile" of "any male from a Middle Eastern country between the ages of 18 and 40 who came to the FBI's attention," *id.*, at 4, and that "Mueller complied." *Id.*, at 51.

Respondents then advert to allegations in the Fourth Amended Complaint that Mr. Ashcroft met with a "small group of government officials," App. Petn. Cert., at 274a, ¶ 61, and with that small group "mapped out" ways to pressure the detainees, including by spreading the word among law enforcement personnel that these detainees "were suspected terrorists, or people who knew who the terrorists were," and that the detainees should be encourgaged "in any way" to cooperate. *Id.*, at 274a-275a, ¶ 61. *See* Brief For Resps., at 56. Respondents allege that that Mr. Ziglar "was at many of these meetings," where he discussed "the entire process of interviewing and incarcerating out-of-status individuals." App. Petn. Cert., at 275a, ¶ 62.

These allegations, respondents argue, suffice to permit the Court to draw the inference that Mr. Ziglar knew respondents were being held in the most restrictive conditions, as well as the inference that he acted with discriminatory intent and with the intent to punish respondents arbitrarily. Brief For Resps., at 64-65.

There is less here than meets the eye. Despite their loose language, the Fourth Amended Complaint cannot be fairly read as alleging that Mr. Ziglar made the decision to hold the New York List detainees as "of interest" until cleared by the FBI. Rather, the Fourth Amended Complaint alleges only that Mr. Ziglar "condoned" or "complied with" Mr. Ashcroft's decision in that regard.

"Condone" means "to overlook, forgive, or disregard (an offense) without protest or censure." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, at 384 (4th ed. 2006). *E.g.*, III OXFORD ENGLISH DICTIONARY, at 384 (2nd ed. 1989) ("To approve or sanction, usu. tacitly; to tolerate.") The allegation that Mr. Ziglar "overlooked" or "forgave," or "disregarded without protest or censure," or "tolerated" Mr. Ashcroft's decision does not plausibly allege that Mr. Ziglar did anything wrong. It does not support an inference that Mr. Ziglar knew of the allegedly harsh conditions in which detainees were to be held in light of Mr. Ashcroft's decision, or that he acted with discriminatory or punitive motive.

As for the averment that Mr. Ziglar "complied" with the policy, that, in and of itself, is not sufficient to support a claim of purposeful constitutional violations by Mr. Ziglar. It must be supported by averments with "factual

content that allo[w] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. When one examines the specific allegations of the Fourth Amended Complaint as to how Mr. Ziglar supposedly "complied" with Mr. Ashcroft's decision, the flimsiness of respondents' claim against Mr. Ziglar become apparent.

The allegation that Mr. Ziglar prepared daily reports is of no consequence, as it alleges no improper conduct by Mr. Ziglar. The Fourth Amended Complaint in this regard alleged only that "Ashcroft insisted on regular detailed reporting ***on arrests***" and on "other developments of interest," with no further specification as to what those "other developments of interest" were. App. Petn. Cert., at 275a, ¶ 63. This allegation, and the allegation that Mr. Ziglar provided "much of this information," *id.*, at 275a, ¶ 64, in no way support the inferences that respondents seek to impute to them, most especially respondents' contention that these allegations show that Mr. Ziglar knew of the conditions in which respondents were allegedly being held. Brief For Resps., at 63. These are not sufficient allegations of fact to allow the Court to draw the inference that Mr. Ziglar knew anything other than the number of arrests.

The argument that Mr. Ashcroft told Mr. Mueller to instruct INS to round up young Muslims from Middle Eastern countries, and that Mr. Mueller complied, is not supported by the averments of the Fourth Amended Complaint. Respondents there alleged that Mr. Ashcroft so instructed Mr. Mueller, App. Petn. Cert. at 265a, ¶ 41, but it nowhere alleges that Mr. Mueller followed this

instruction, informed the INS about it, or brought Mr. Ashcroft's alleged instruction to Mr. Ziglar's attention. To the contrary, the Fourth Amended Complaint alleges that ***the FBI,*** not INS, carried out this instruction, and did so under the guidance of Mr. Ashcroft and Mr. Mueller, not Mr. Ziglar. Immediately after alleging that Mr. Ashcroft had instructed Mr. Mueller to "tell the INS to round up every immigration violator who fit" the profile, the Fourth Amended Complaint alleges:

> "***FBI field offices*** were thus encouraged to focus their attention on Muslims of Arab or South Asian descent. Both men were aware that t his would result in the arrest of many individuals about whom they had no information to connect to terrorism. ***Mueller*** expressed reservations about this result, but he nevertheless knowingly ***joined Ashcroft*** in creating and implementing a policy that targeted innocent Muslims and Arabs." *Ibid.* (emphasis added).

This allegation cannot support any inference that Mr. Ziglar did anything at all as a consequence of Mr. Ashcroft's directive to Mr. Mueller, let alone anything wrong. *E.g., id.*, at 266a, ¶ 42 ("***The FBI field offices*** followed this guidance in investigating Plaintiffs and class members." (Emphasis added.)); Brief For Resps., at 63 ("Respondents alleged that Mueller ran the invesetigation out of FBI headquarters").

As to the allegations about the "small group" of government officials who met with Mr. Ashcroft to plan

how to pressure and coerce the detainees, the Fourth Amended Complaint fails to allege that Mr. Ziglar was a member of that "small group." *Id.*, at 274a-275a, ¶ 61. The Fourth Amended Complaint does allege that Mr. Ziglar "was at many of these meetings," but does not say which ones he attended, giving rise to the inference that there were meetings of this small group Mr. Ziglar did not attend. The Fourth Amended Complaint goes on to allege that all Mr. Ziglar discussed at the meetings he did attend was "the entire process of interviewing and incarcerating out-of-status individuals." *Id.*, at 275a, ¶ 62. This cannot be read as an allegation that Mr. Ziglar helped "ma[p] out ways to exert maximum pressure on the" detainees, discussed how to restrict the detainees' access to the outside world, or agreed to spread the word among the law enforcement community that the detainees had some connection with terrorism. Nor can it support drawing any inferences of discriminatory or punitive motive against Mr. Ziglar.

The Fourth Amended Complaint's flimsy factual averments about Mr. Ziglar cannot support an inference that he acted with either "punitive" or "discriminatory intent." *Id.*, at 64-65.[2] The allegations that he did so are

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[2] Respondents cite to a passage in Mr. Ziglar's Brief on the merits as conceding that Mr. Ziglar knew that the detainees shared the same national origin, race, and religion with the 9/11 attackers, adding "as if that is sufficient on its own to justify their harsh treatment." Brief For Resps., at 62-63. That passage in Mr. Ziglar's brief is a specific reference to what the Fourth Amended Complaint had alleged about

(continued...)

as conclusory as the averments to the same effect in *Iqbal*, and fail to plausibly allege that Mr. Ziglar acted in violation of the Constitution, just as the averments failed to support similar claims in *Iqbal*. Nor do the other averments of the Fourth Amended Complaint, even if characterized as non-conclusory, give respondents' claims the "facial plausibility" that *Iqbal* requires, because those averments fail to plead "factual content that allows the court to draw the reasonable inference that [Mr. Ziglar] is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

Just as in *Iqbal*, the complaint at issue here has failed to allege that Mr. Ziglar acted " 'because of,' not merely 'in spite of the action's adverse effects upon an identifiable group." *Iqbal*, 556 U.S. at 681. The factual averments of the Fourth Amended Complaint as to Mr. Ziglar are consistent with an "obvious alternative explanation," *Iqbal*, 556 U.S. at 682 (internal quotation marks omitted), namely, that Mr. Ziglar acted out of concern that the detainees could leave the country or engage in activities in furtherance of terrorist objectives if not detained until cleared.

(...continued)

him, not a concession by Mr. Ziglar as to what he knew. Brief Of Petitioner James W. Ziglar, at 30 ("The FAC itself alleges Mr. Ziglar knew . . . ."). Even if it did not refer to the allegations of the Fourth Amended Complaint, the passage does not bear the import respondents place on it.

Respondents' Fourth Amended Complaint has failed to plead a plausible claim for relief as to petitioner James W. Ziglar. For that reasons, the Court should reverse the judgment of the court of appeals.

CONCLUSION

The Court should reverse the judgment of the United States Court of Appeals for the Second Circuit as to petitioner, James W. Ziglar, in No. 15-1358.

Respectfully Submitted,

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APPENDIX

2001 8 USCS § 1103

2001 United States Code Archive

UNITED STATES CODE* SERVICE > *TITLE 8. ALIENS AND NATIONALITY* > *CHAPTER 12.* IMMIGRATION *AND NATIONALITY* > *GENERAL PROVISIONS

§ 1103. Powers and duties of the Attorney General and Commissioner; appointment of Commissioner

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(a)

(1) The Attorney General shall be charged with the administration and enforcement of this Act and all other laws relating to the immigration and naturalization of aliens, except insofar as this Act or such laws relate to the powers, functions, and duties conferred upon the President, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: Provided, however, That determination and ruling by the Attorney General with respect to all questions of law shall be controlling.

(2) He shall have control, direction, and supervision of all employees and of all the files and records of the Service.

(3) He shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other

acts as he deems necessary for carrying out his authority under the provisions of this Act.

(4) He is authorized, in accordance with the civil-service laws and regulations and the Classification Act of 1949, to appoint such employees of the Service as he deems necessary, and to delegate to them or to any officer or employee of the Department of Justice in his discretion any of the duties and powers imposed upon him in this Act; he may require or authorize any employee of the Service or the Department of Justice to perform or exercise any of the powers, privileges, or duties conferred or imposed by this Act or regulations issued thereunder upon any other employee of the Service.

(5) He may require or authorize any employee of the Service or the Department of Justice to perform or exercise any of the powers, privileges, or duties conferred or imposed by this Act or regulations issued thereunder upon any other employee of the Service.

(6) He is authorized to confer or impose upon any employee of the United States, with the consent of the head of the Department or other independent establishment under whose jurisdiction the employee is serving, any of the powers, privileges, or duties conferred or imposed by this Act or regulations issued thereunder upon officers or employees of the Service.

(7) He may, with the concurrence of the Secretary of State, establish offices of the Service in foreign countries; and, after consultation with the Secretary of State, he may, whenever in his judgment such action may be necessary to accomplish the purposes of this Act, detail employees of the Service for duty in foreign countries.

(8) In the event the Attorney General determines that an actual or imminent mass influx of aliens arriving off the coast of the United States, or near a land border, presents urgent circumstances requiring an immediate Federal response, the Attorney General may authorize any State or local law enforcement officer, with the consent of the head of the department, agency, or establishment under whose jurisdiction the individual is serving, to perform or exercise any of the powers, privileges, or duties conferred or imposed by this Act or regulations issued thereunder upon officers or employees of the Service.

(9) The Attorney General, in support of persons in administrative detention in non-Federal institutions, is authorized--

(A) to make payments from funds appropriated for the administration and enforcement of the laws relating to immigration, naturalization, and alien registration for necessary clothing, medical care, necessary guard hire, and the housing, care, and security of persons detained by the Service

pursuant to Federal law under an agreement with a State or political subdivision of a State; and

(B) to enter into a cooperative agreement with any State, territory, or political subdivision thereof, for the necessary construction, physical renovation, acquisition of equipment, supplies or materials required to establish acceptable conditions of confinement and detention services in any State or unit of local government which agrees to provide guaranteed bed space for persons detained by the Service.

After consultation with the Secretary of State, the Attorney General may authorize officers of a foreign country to be stationed at preclearance facilities in the United States for the purpose of ensuring that persons traveling from or through the United States to that foreign country comply with that country's immigration and related laws. Those officers may exercise such authority and perform such duties as United States immigration officers are authorized to exercise and perform in that foreign country under reciprocal agreement, and they shall enjoy such reasonable privileges and immunities necessary for the performance of their duties as the government of their country extends to United States immigration officers.

(b)

(1) The Attorney General may contract for or buy any interest in land, including temporary use rights,

adjacent to or in the vicinity of an international land border when the Attorney General deems the land essential to control and guard the boundaries and borders of the United States against any violation of this Act.

(2) The Attorney General may contract for or buy any interest in land identified pursuant to paragraph (1) as soon as the lawful owner of that interest fixes a price for it and the Attorney General considers that price to be reasonable.

(3) When the Attorney General and the lawful owner of an interest identified pursuant to paragraph (1) are unable to agree upon a reasonable price, the Attorney General may commence condemnation proceedings pursuant to the Act of August 1, 1888 (Chapter 728; *25 Stat. 357*) [*40 USCS §§ 257* and 258].

(4) The Attorney General may accept for the United States a gift of any interest in land identified pursuant to paragraph (1).

(c) The Commissioner shall be a citizen of the United States and shall be appointed by the President, by and with the advice and consent of the Senate. He shall be charged with any and all responsibilities and authority in the administration of the Service and of this Act which are conferred upon the Attorney General as may be delegated to him by the Attorney General or which may be prescribed by the Attorney General. The Commissioner may enter into cooperative agreements with State and local law enforcement

agencies for the purpose of assisting in the enforcement of the immigration laws.

(d)

(1) The Commissioner, in consultation with interested academicians, government agencies, and other parties, shall provide for a system for collection and dissemination, to Congress and the public, of information (not in individually identifiable form) useful in evaluating the social, economic, environmental, and demographic impact of immigration laws.

(2) Such information shall include information on the alien population in the United States, on the rates of naturalization and emigration of resident aliens, on aliens who have been admitted, paroled, or granted asylum, on nonimmigrants in the United States (by occupation, basis for admission, and duration of stay), on aliens who have not been admitted or have been removed from the United States, on the number of applications filed and granted for cancellation of removal, and on the number of aliens estimated to be present unlawfully in the United States in each fiscal year.

(3) Such system shall provide for the collection and dissemination of such information not less often than annually.

(e)

(1) The Commissioner shall submit to Congress annually a report which contains a summary of the information collected under subsection (d) and

an analysis of trends in immigration and naturalization.

(2) Each annual report shall include information on the number, and rate of denial administratively, of applications for naturalization, for each district office of the Service and by national origin group.

(f) The Attorney General shall allocate to each State not fewer than 10 full-time active duty agents of the Immigration and Naturalization Service to carry out the functions of the Service, in order to ensure the effective enforcement of this Act.